

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

April 7, 2010

Dean A. Campbell, Esquire
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RE: Resort Point Custom Homes, LLC v. Michael Tait
C.A. No. S08C-04-020-ESB
Letter Opinion

Date Submitted: January 6, 2010

Dear Counsel:

This is my decision on Plaintiff Resort Point Custom Homes, LLC's Motion for Partial Summary Judgment and Defendant Michael Tait's Motion for Summary Judgment in this case involving a dispute over some of the assets and liabilities of Resort Point Builders, LLC, a dissolved Delaware limited liability company that is not a party to this case.

STATEMENT OF FACTS

This case arises out of a series of contractual disputes between Resort Point Builders and Tait. Resort Point Builders was a Delaware limited liability company that built commercial and residential structures. It is now dissolved. Tait is a plumber. He did plumbing work for Resort Point Builders. There are four projects involving Resort Point Builders and Tait that are relevant to this case. The first project is the "Indian Beach" Project. Tait completed the plumbing for this project and was paid. A problem with the

plumbing came up later that allegedly caused damages of \$4,575. The second and third projects are the “214 Parkwood” and “Atlantic Avenue” Projects. Tait completed the plumbing for these two projects, but he was not paid the \$34,500 that he was owed. The fourth project is the “Peninsula” Project. Resort Point Builders was building a house in the Peninsula Development and contracted with Tait to install the plumbing in two phases for \$26,000. Tait completed the first phase and was paid \$16,800. He was waiting for Resort Point Builders to substantially complete the house so that he could do the second phase of the plumbing when a dispute arose between the members of Resort Point Builders. The members of Resort Point Builders were Ralph Picard, Susan Picard and Rob Pickryl. This dispute led to the dissolution of Resort Point Builders. Rob Pickryl formed a new company named Resort Point Construction, LLC. Ralph Picard formed a new company named Resort Point Custom Homes, LLC. Rob and Ralph then informally divided the ongoing projects of Resort Point Builders between the new limited liability companies. Resort Point Builders assigned the “Peninsula” and “Indian Beach” Projects to Resort Point Custom Homes and the “214 Parkwood” and “Atlantic Avenue” Projects to Resort Point Construction.

When it was time for Tait to complete the second phase of the plumbing for the “Peninsula” Project, Resort Point Custom Homes demanded that he finish the work. Tait refused to complete the work because Resort Point Builders still owed him \$34,500 for the “214 Parkwood” and “Atlantic Avenue” Projects. Resort Point Custom Homes then hired another plumber to complete the plumbing for the “Peninsula” Project.

Ralph Picard prepared a Certificate of Cancellation for Resort Point Builders on July 13, 2007, and filed it with the Delaware Secretary of State on January 10, 2008. He sent

out a letter to the vendors of Resort Point Builders on June 5, 2007. The letter stated that Resort Point Builders had been reorganized and that two new separate and distinct companies had been formed - Resort Point Custom Homes, LLC and Resort Point Construction, LLC. The letter stated further that Resort Point Custom Homes was owned and operated by Ralph Picard and that Resort Point Construction was owned and operated by Suzanne and Rob Pickryl. The letter also stated that all accounts with Resort Point Builders should be closed and that invoices for work and materials ordered by Rob Pickryl should be sent to Resort Point Construction.

Peggy Dolan, an employee with Dolan & McDevitt, a bookkeeping firm, sent out a letter to vendors who had apparently dealt with Resort Point Builders, Resort Point Construction and Resort Point Custom Homes on November 14, 2007. The letter notified the vendors that Resort Point Builders no longer existed and that invoices for jobs performed for Resort Point Builders should be sent to Resort Point Construction. The letter specified that this instruction included invoices for the "214 Parkwood" and "Atlantic Avenue" Projects. Resort Point Construction did not pay Tait's \$34,500 claim.

Resort Point Custom Homes filed a two count complaint against Tait, seeking \$56,150 for the "Peninsula" Project and \$4,575 for the "Indian Beach" Project. Tait filed an answer denying that he owed anything to Resort Point Custom Homes and arguing that he has the right to set-off the \$34,900 owed to him by Resort Point Builders against any money that he might owe to Resort Point Custom Homes.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues

of fact.¹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² The Court views the evidence in a light most favorable to the nonmoving party.³ Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁴ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.⁵ If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.⁶

DISCUSSION

I. Set-Off

Resort Point Custom Homes is seeking partial summary judgment on Tait's set-off defense. Tait did work on four projects for Resort Point Builders. During the dissolution of Resort Point Builders it assigned the "Indian Beach" and "Peninsula" Projects to Resort

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ *Id.* at 680.

⁴ *Super. Ct. Civ. R. 56(e); Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

⁵ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S. Ct. 1946 (1992).

⁶ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

Point Custom Homes and the “214 Parkwood” and “Atlantic Avenue” Projects to Resort Point Construction. Tait now seeks to set-off the \$34,000 that Resort Point Builders owes him against the claims filed by Resort Point Custom Homes for monies allegedly due on the “Indian Beach” and “Peninsula” Projects. In order for a claim to be subject to a set-off, there must be “(a) mutual debts between the parties to an action, (b) due at the time the action is brought, (c) in the same right, and (d) being for a sum [certain].”⁷

Resort Point Custom Homes argues that it is not the party that owes \$34,500 to Tait for the “214 Parkwood” and “Atlantic Avenue” Projects. This is correct, but it does not matter in this case. Resort Point Builders and Tait were parties to contracts for four projects. Resort Point Builders owes \$34,500 to Tait for his work on the “214 Parkwood” and “Atlantic Avenue” Projects. Resort Point Builders assigned its contractual rights under the “Indian Beach” and “Peninsula” Projects to Resort Point Custom Homes. It is a rudimentary principle of contract law that the assignee takes the assigned claim subject to all defenses of the obligor against the assignor.⁸ That is to say that the assignee stands in the shoes of the assignor.⁹ He acquires no greater right than that which was possessed by his assignor.¹⁰ Moreover, defenses may be interposed against the assignee if they were

⁷ *Wooley on Delaware Practice*, § 492 (1906).

⁸ *Madison Fund, Inc. v. Midland Glass Company, Inc.*, 1980 WL 332958, at *2 (Del. Super. Aug. 11, 1980) citing 3 Williston on Contracts § 432, pp. 177-178; Restatement of Contracts § 167(1).

⁹ *Fox-Greenwald Sheet Metal Co., Inc. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1357 n. 69 (D.C. Cir. 1971); 6 Am. Jur.2d *Assignments* § 102.

¹⁰ *Id.*

available against the assignor, including the right of set-off by the debtor.¹¹ Thus, for purposes of the set-off analysis, Resort Point Custom Homes is treated just as if it were Resort Point Builders. Resort Point Builders owes \$34,500 to Tait for the “214 Parkwood” and “Atlantic Avenue” Projects. Thus, Tait may set-off the \$34,500 that Resort Point Builders owes to him against any money that he may owe to Resort Point Custom Homes for the “Indian Beach” and “Peninsula” Projects. The Motion for Partial Summary Judgment filed by Resort Point Custom Homes on Tait’s set-off defense is denied.

II. The Dissolution of Resort Point Builders

Tait is seeking summary judgment on the claims filed against him by Resort Point Custom Homes based upon an alleged violation of the Delaware Limited Liability Company Act¹² by Resort Point Builders. Resort Point Builders is a dissolved Delaware limited liability company. Resort Point Builders had a number of assets at the time of its dissolution, including four construction projects and the related contractual rights and obligations. Two of the assets that Resort Point Builders had before dissolution were the “Indian Beach” and “Peninsula” Projects and Tait’s contractual obligations to it under those projects. Two of the other assets that Resort Builders had before dissolution were the “214 Parkwood” and “Atlantic Avenue” Projects, subject to the contractual obligations owed by it to Tait. Tait argues that Resort Point Builders assigned those assets and contractual rights and obligations to Resort Point Custom Homes and Resort Point Construction in violation of the Delaware Limited Liability Company Act.

¹¹ 20 Am. Jur.2d *Counterclaim* § 58 (2005). *Guaranty Trust Co. Of New York v. United States*, 304 U.S. 126, 141-143 (1938).

¹² 6 *Del.C.* §§ 18-101 to 18-1109.

The Delaware Limited Liability Company Act governs the formation, management and dissolution of Delaware limited liability companies.¹³ Section 18 - 804(b)(1) states that a limited liability company that has dissolved “[s]hall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited liability company.” Section 18-804 (a)(1) states “[u]pon the winding up of a limited liability company, the assets shall be distributed to creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members and former members . . .” Tait argues that Resort Point Builders was aware of his \$34,500 claim and did not pay it or make any reasonable provision to pay it, thereby making any distribution of its assets invalid, including the assignment of certain contractual rights to Resort Point Custom Homes. Although Tait did not argue it, I note that Section 18-804 only provides for the distribution of the limited liability company’s assets to creditors and members. It has no provision for the distribution of assets to other parties.

Resort Point Builders assigned four of its on-going projects to two newly-formed limited liability companies that were neither creditors or members of Resort Point Builders. The only provision that Resort Point Builders made to address Tait’s claim was to tell him to send his bills to Resort Point Construction, a newly formed limited liability company that he had no contractual relationship with and that was set up by one of the former members

¹³ *Id.*

of Resort Point Builders. While the reasonableness requirement is certainly open-ended, it seems that this alone was not an appropriate way to handle Tait's claims and the other creditors' claims. However, given the limited record before me, I can not rule as a matter of law that Resort Point Builders did not comply with Section 18-804. Thus, this issue must be decided at trial. At trial, Resort Point Custom Homes, as the party asserting certain contractual rights against Tait,¹⁴ will have the burden of proving that it acquired the contractual rights related to the "Indian Beach" and "Peninsula" Projects from Resort Point Builders in compliance with the Delaware Limited Liability Company Act. Tait's Motion for Summary Judgment is denied.

CONCLUSION

The Motion for Partial Summary Judgment filed by Resort Point Custom Homes on Tait's set-off claim is DENIED. Michael Tait's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

¹⁴ *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 545 (Del. Super. 2005).